Socialism and the Constitution

By Michael W. McConnell, *Senior Fellow, Hoover Institution*

You say you'll change the constitution
Well, you know
We all want to change your head. . .

But if you go carrying pictures of chairman Mao
You ain't going to make it with anyone anyhow . . .

— "Revolution," the Beatles (1968)

Justice Oliver Wendell Holmes famously described the US Constitution as "made for people of fundamentally differing views." (*Lochner v. New York* dissent) By that, he meant that the Constitution does not commit the nation to any particular ideological or economic theory, including *laissez-faire* capitalism. Instead it leaves decisions about national policy to the democratic process, subject to the constraints of the Bill of Rights. Within the range of ordinary politics, Holmes was correct: Americans can decide, through their elected representatives, to have high taxes or low, generous welfare payments or a basic social safety net, government-owned enterprises or privatization, heavy-handed or light-touch regulation. That is the difference between democratic socialism and a largely free-enterprise economy. As practiced (more in the past than today) in the Scandinavian countries, "democratic socialism" has meant a capitalist, private-profit driven market economy, with high rates of taxation and economic redistribution. In its post-war British incarnation, "democratic socialism" added government ownership of major industry. (This was abandoned mostly for the pragmatic reason that government is not a good manager of economic enterprise.) None of this is forbidden by the US Constitution. Congress can set taxes as high as it wishes and can devote the proceeds to redistributionist policies. Governments can, if they wish, use the power of eminent domain to seize ownership of the means of production (provided that owners are compensated for the value of property taken), and they have owned and run large enterprises like the Tennessee Valley Authority. Regulation of some sectors of the economy can be so extensive that the companies are rendered "private" in name only. Most policies that go by the label "democratic socialism" are thus permitted under the Constitution, so long as these objectives are pursued peacefully, democratically, and in accordance with law.

But the Constitution is not completely indifferent to the nature of the socioeconomic regime. It does not commit the nation to any one set of policies, but it stands as a barrier to revolutionary absolutism; it rests on a philosophy of individual rights that is most consistent with liberal democracy and private property; and it contains a number of safeguards designed to foster a free and prosperous economy.

Would a Socialist Revolution Require Us to Change the Constitution?

The Beatles were right: a socialist revolution inspired by "pictures of Chairman Mao" (or tee-shirts of Che Guevara) would indeed have to "change the constitution." Revolutions entail violence undisciplined by law or orderly process; the Constitution requires due process of law, enshrines the right of habeas corpus, forbids arbitrary confinement, and interposes a jury of one's peers between the accused and his accusers. Revolutions displace elected government with self-appointed leaders purporting to speak in the name of the People; the Constitution reserves governing power to republican institutions, with regular elections at specified intervals. (No, Mr. Trump cannot delay the presidential election, whatever nonsense he may tweet.) Revolutions seize control over the media for dissemination of news and opinion; the First Amendment insists that these be under decentralized private control, allowing dissenting voices to be heard—even voices deemed by the dominant group to be retrograde or pernicious. A socialist revolution along Marxist or Maoist lines would bring an end to private property and the market ordering of society through private contract, while the Constitution, by contrast, explicitly protects private property and the obligation of contract.

Of course, this presupposes that at a time of revolutionary upheaval the guardrails of the Constitution would be respected. That is far from certain. It might even seem improbable; revolutionaries do not typically respect the niceties of written constitutions. But the structural features of the Constitution—its division of power among a large number of independently chosen and controlled entities—is designed to make it as difficult as possible for mass movements to impose their will on the nation as a whole, without the time for reflection and resistance. Power is divided among three branches at the national level, fifty different states, and thousands of municipalities, with coercive authority further divided among police, militia, and military (a point that has come to public attention recently, in connection with the disputed use of federal troops and agents to enforce order in the cities over the objection of local officials). A faction pushing radical change cannot simply seize the levers of power at one central location; it has to build support in diverse places like California and Texas, Chicago and Pensacola. Although the "influence of factious leaders may kindle a flame within their

particular States," James Madison wrote, the diffusion of political authority will make them "unable to spread a general conflagration through the other States" (*Federalist* 10).

Even apart from actual revolution, the checks and balances built into American government make it difficult to anyone, whatever their ideology, to achieve rapid and transformative change. Both Barack Obama and Donald Trump swept into office with the support of both Houses of Congress (Obama with a filibuster-proof majority in the Senate), but both presidents committed the political sin of overreach, both had their agendas delayed by a judiciary that was largely named by the other party, and both lost their majority in the House of Representatives in just two years. Our Constitution allows democratic change, but the checks and balances in the system are designed to slow things down, to give the American people time to reflect on whether the change being pressed by their representatives is really desirable. The Founders attempted to mold public democratic institutions in such a way as to protect "the rights of the minor party" from the "superior force of an interested and overbearing majority" (*Federalist* 10). The constitutional system might thus be described as "small-c conservative": not right-wing, but resistant to rapid and convulsive change from either the right or the left.

The Constitution's principal mechanism for taming and controlling the power of majority factions was what today we would call diversity, and the Founders called "multiplicity of factions." In a relatively homogeneous district or jurisdiction, a particular group—whether ideological, economic, religious, racial, or based on some other common characteristic—can dominate and sweep all before it, without need for compromise or for consideration of the concerns and interests of dissenters. When the majority is "united by a common interest, the rights of the minority will be insecure" (*Federalist* 51). The all-white districts of the Jim Crow South provide a familiar historical example: political leaders in such districts had no political need to heed the interests of the African American minority disadvantaged by their policies. But the point can be generalized. Modern social science research has confirmed Madison's intuition that the presence of dissenting voices within deliberative bodies has the effect of reducing polarization and moderating their views. Diversity of ideas thus mitigates the dangers of ideological faction. That is why multimember legislative bodies, elected from a variety of heterogeneous districts, are less susceptible to extremes than social movements or the executive branch, and why the framers intended Congress to be the central institution for national policy making.

To be sure, this system slows the pace of change, but the Founders regarded this as a plus. It is not possible for people to order their affairs and plan for the future without a certain confidence that the rules will not change in the middle of the game. As Madison explained in *Federalist* 62, "It will be of little avail to the people, that the laws are made by men of their own choice, if the laws be . . . repealed or revised before they are promulgated, or undergo such incessant changes that no man, who knows what the law is to-day, can guess what it will be to-morrow." Not only does uncertainty about the law "[poison] the blessings of liberty itself," but it dampens the incentive for socially productive economic endeavor. "What prudent merchant will hazard his fortunes in any new branch of commerce when he knows not but that his plans may be rendered unlawful before they can be executed?" Stability and predictability of law is essential to "the success or profit" of "every useful undertaking."

The Philosophy of the Constitution

Although democratic socialism is not "unconstitutional" if achieved through democratic means, the Constitution has a certain philosophical content, which impresses itself subtly and powerfully on the national ethos. The Constitution was written against a backdrop of natural rights theory, in which the predominant purpose of government was to protect the life, liberty, and property of each person. The Founders understood that government of this sort would not only "secure the blessings of liberty" but also establish the preconditions for long-lasting national prosperity. The Constitution did not bind future generations to any particular ideology, but it did presuppose the importance of individual rights, and it laid the groundwork for the most productive economy the world has ever seen.

The writings of English philosopher John Locke are a good place to start. In his *Second Treatise on Government (1689),* Locke reasoned that by nature, all human beings are "free, equal, and independent." This freedom, equality, and independence is the foundation of the rights to personal security and property. As Locke put the point: "Every man has a property in his own person: this no body has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his."

But while all people have rightful ownership of themselves and the products of their labors, those rights are insecure in the absence of civil society and the protections it can confer. You might spend years cultivating a farm or building a store, only to have everything taken away or destroyed by brigands, mobs, or warlords. Without civil society and the rule of law, no one is safe. Locke called this condition of lawlessness the "state of nature." This term causes some to think that he was speaking of an imaginary period of human history, before recorded history. But the state of nature is not located in a mythical past. It is an ever-present possibility when civil authority breaks down. Think of Iraq after the fall of Saddam Hussein, of Bosnia or Northern Ireland during their troubles, of gangland Chicago, or even of American cities during times of violent unrest. Like weeds in an untended garden, the state

of nature breaks out afresh whenever the forces of civil society weaken or retreat.

It bears emphasis that the biggest victims of lawlessness are not the rich and powerful, who can find or buy alternative private forms of protection, but the weak and vulnerable, who cannot. In our society, the victims are all too often minority or recent immigrant communities. The (presumably temporary) retreat of the police from active enforcement of the law in many of our cities leaves these vulnerable people subject to the highest death tolls and destruction of property.

Not only do people in the state of nature live in fear for their personal security, but this insecurity of rights removes the incentive to invest labor and resources in long-term projects of wealth creation. If the fruits of their labors are insecure, no one will make the short-term sacrifice that is necessary to create jobs and prosperity for all. People might wish to use their brains, their muscles, and their savings to cultivate farms, start shops, and create wealth, but who would do so if the profits may be smashed, stolen, or regulated away? The rule of law is a key ingredient of prosperity as well as of freedom and security.

As Locke and the American Founders understood, government itself can be as dangerous to the rule of law as private wrongdoers and can be just as much a threat to property and personal security. The American Revolution was sparked by a British soldier shooting an innocent Bostonian during a protest. An uncontrolled government is not much less dangerous than a mob and may be more so. That is why the recent police brutality and misconduct connected with the killing of George Floyd tapped so deeply into the shared American consciousness. Persons armed with the coercive power of the state must be bound by the rule of law, no less than private malefactors. The rule of law must prevail in police stations as well as the streets. As James Madison wrote, "In framing a government which is to be administered by men over men, . . . you must first enable the government to control the governed; and in the next place to oblige it to control itself" (*Federalist* 51).

What about Slavery?

Some readers are undoubtedly thinking: "What about slavery?" If all human beings are "free, equal, and independent"—if all are entitled to due process of law and protection against the depredations of others—then how could the Constitution permit, and even protect, the institution of slavery? The answer is that it was an ugly compromise without which there would have been no Constitution and no Union. The first step in John Locke's logic was that "every man has a property in his own person: this no body has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his." It is not logically possible to begin with this premise and end up embracing slavery.[1] Recent efforts such as the *New York Times*'s "1619 Project" to portray slavery as foundational to the American ethos have it backwards: from the beginning, slavery was in blatant contradiction to the governing philosophy of the new nation, and it had to be eliminated before America could be true to itself.

At the Constitutional Convention, no one doubted that the protections for slavery were a brutal and (for most of the delegates) distasteful compromise. According to Madison's notes (see Ferrand), Rufus King of Massachusetts called the admission of slaves "a most grating circumstance to his mind, and he believed would be so to a great part of the people of America." Gouverneur Morris of Pennsylvania called domestic slavery "a nefarious institution" and "the curse of heaven on the States where it prevailed." Even slaveholders at the Constitutional Convention recognized the horrific character of the institution. George Mason of Virginia, who exercised ownership over hundreds of souls on his plantation on the Potomac, told his fellow delegates that slavery brings "the judgment of heaven on a Country" and that "every master of slavers is born a petty tyrant." Southern delegates typically refrained even from attempting a moral defense. John Rutledge of South Carolina defensively declared that "religion and humanity had nothing to do with [it.] . . . The true question at present is whether the Southern States shall or shall not be parties to the Union." His fellow South Carolinian Charles Pinckney feebly suggested that if the region were left to its own devices, South Carolina "may perhaps by degrees do of herself what is wished." Most strikingly, the framers carefully refrained from employing the terms "slave" or "slavery" in the Constitution, instead using euphemisms such as "persons held to service or labor." One delegate explained why: they were "ashamed to use the term 'slaves.'" Interestingly, the most determined opponents of slavery tended to be the advocates of a commercial (as opposed to agrarian) republic; capitalism was understood to be the alternative to a slave-labor economy.

Eventually, the Constitution was amended in the wake of the Civil War to correct the most obvious constitutional flaws stemming from the slavery compromise and attendant racism. First, the Thirteenth Amendment put an end to slavery and involuntary servitude, thus removing the most obvious exception to the natural rights principles of the Constitution. Second, the Fourteenth Amendment extended the rights of citizenship to formerly enslaved people, and indeed to all persons born in the United States (with minor exceptions). These "privileges and immunities of citizens of the United States" include the basic rights to participate in civil society: to own, sell, and use property; to make and enforce contracts; and to equal application of criminal law and protections for personal security, among others. Locke would recognize all of these as fundamental rights. Third, all persons were guaranteed the "equal protection of the laws," thus for the first

time enshrining the principle of equality under the law into the Constitution and striking a blow against the evil of racial discrimination. Fourth, the protection of due process of law was extended to acts of state as well as the federal government. The original Framers assumed that state governments, being closer to the people, would be less dangerous to their rights than the more distant and less accountable national government, which is why the Bill of Rights applied only at the national level. The experience of antebellum slavery, which entailed assaults on almost every fundamental freedom, showed that was an error. And finally, the Fifteenth Amendment forbade voting discrimination on the basis of race—the first of a series of constitutional amendments expanding the right to vote.

To be sure, effective enforcement of these equality protections took a century or more to accomplish and even now remains incompletely fulfilled. But with the adoption of the Thirteenth, Fourteenth, and Fifteenth Amendments, the Lockean promise of respect to all persons as "free, equal, and independent," entitled to protection of both person and property, at last had its place in the fundamental charter of the United States. Subsequent amendments and civil rights statutes further advanced these principles. Adherence to those principles is the most promising means ever devised for achieving both personal liberty and social prosperity.

Legal Safeguards of Liberty

The framers of the Constitution of 1788 relied primarily on structural safeguards—federalism, separation of powers, enumerated (thus limited) powers, regular elections, and an independent judiciary—to protect natural rights. Thus, the initial Constitution, signed by the delegates in 1787 and ratified by the people of eleven states in 1788, did not even have a Bill of Rights. The leading framers thought a bill of rights unnecessary because, as Hamilton put the point, "the Constitution is itself, in every rational sense, and to every useful purpose, a Bill of Rights" (*Federalist* 84). This was a political miscalculation: the absence of a bill of rights was the most potent argument against ratification of the new system. Thus, when the First Congress convened in 1790, one of the first orders of business was to amend the Constitution by adding protections for basic natural rights. This is not the occasion for a summary of all of the first ten amendments; whole courses and treatises are devoted to nearly every one of them. But two sets of protections are the most significant.

First are the protections for freedoms of conscience and communication: speech and press, assembly and petition, and religion. These freedoms protect the ability of all persons to think for themselves, to say what they think publicly and try to persuade others, and to put their most fundamental beliefs into practice, so long as this is consistent with the equal rights of others and of the public peace. The point of these freedoms is not simply the psychological value of self-actualization, but the formation of a diverse culture in which different ideas can flourish and interact. The First Amendment reflects the same high regard for diversity of views we have already seen in Madison's structural arguments for the multiplicity of factions. A society with a wide variety of views, freely expressed, would of necessity be more tolerant of difference, more open to self-criticism, and less prone to fanaticism. Anyone who has experienced an ideologically homogeneous environment—like many modern universities—can testify to the basic truth of that insight. Importantly, although the legal protections of the First Amendment apply only to the government ("state action")—and originally applied only to the federal government—the philosophical commitment behind those protections served powerfully to shape the American character. Indeed, without public commitment to dissent and diversity, it would not much matter that the government itself is prohibited from acting as the censor. The most significant free speech disputes today take place not in lawsuits against governments but in private arenas such as social media, universities, workplaces, and the press.

Second are the protections for life, liberty, and property through the guarantee of the rule of law. These protections, embodied most clearly in the Due Process Clauses, are the very heart of the Lockean natural rights theory with which this essay began. The Due Process Clauses (referred to here in the plural because there are two Due Process Clauses, one applicable to the federal government and one to the states) do not set any particular standard for liberty or property. Rather, they provide security for the liberty and property people already enjoy under prior law. This is clear from their words: "No person . . . shall be *deprived* of life, liberty, or property without due process of law." To say that a person may not be "deprived" of something presupposes that they had that thing in the first place. Moreover, the requirement that any deprivation be effectuated only with "due process of law" was understood to have the three components of a known, settled law; an objective judge in the case of disputes; and a firm and faithful execution.

The opposite of due process, as the Founders understood it, was arbitrary government: government in which the rights of individuals are dependent on, and vulnerable to, the transient will of those in power. As Locke put it, every person must have the freedom to order their actions and dispose of their possessions and persons as they think fit, within the bounds of the law, "without asking leave or depending upon the will of any other man." (*Second Treatise of Government*) This concept must not be confused with political libertarianism. The rule of law is compatible with extensive regulation in the common interest; how extensive is a matter of democratic choice. But whatever the extent of regulation, it must be achieved in the form of neutral laws, known in advance and applicable on a neutral basis to all.

Prosperity and the Constitution

After the delegates to the Constitutional Convention took their final vote, and thirty-nine of them affixed their signatures, the Convention sent the document to the Congress, then sitting in New York, with a letter explaining what they hoped to accomplish. According to the letter, the Constitution would serve what "appears to us the greatest interest of every true American," namely "our prosperity, felicity, safety, perhaps our national existence." Most of the constitutional deliberations had to do with creating the institutions for workable republican government. But as the letter indicates, the delegates sought to promote the "prosperity, felicity, and safety" of the new nation as well. For many of them, that meant creating the prerequisites for a commercial republic.

> What were those prerequisites? Let us list the most significant:
>
> - A stable coinage and money supply
> - A common market in which Americans could trade freely throughout the thirteen states, with no hindrance from local protectionism
> - Exclusive national authority over foreign commerce, to enable the United States to negotiate mutually beneficial trade deals with foreign countries
> - A national court system that would protect property and contract rights without the local biases of populist juries
> - Sufficient resources (especially western lands) and taxing power to finance national expenditures and reduce the national debt
> - Guarantees that laws affecting liberty and property would be prospective and general in nature
> - National control over the instrumentalities of national commerce, to prevent self-interested local interference with economic activity
> - Provision for uniform bankruptcy laws and protections for patents and trademarks "to promote the Progress of Science and useful Arts"
> - Prohibition of export taxes at either the state or the national level

None of these provisions could guarantee "prosperity," but they gave the nation's fledgling government the tools needed to create a free economy. As the first Secretary of the Treasury, the farsighted Alexander Hamilton took full advantage of these authorities and charted a course that would make the United States the unparalleled land of opportunity and magnet for immigration and investment from all over the world. To a very great extent, we still benefit from those early steps, but we must never grow complacent or forget the foundations of our success. The Constitution was written for "people of fundamentally different views," and it leaves basic policy choices to the determination of our elected representatives. The Constitution may protect against violent revolution, but it cannot protect against improvident democratic choices. Only an electorate informed about the nature of rights and the rule of law can do that.

Our Present Discontents

As we experience the multiple crises of 2020, the Constitution's safeguards against oppressive majority factions seem to be losing some of their force. Instead of a multiplicity of factions, American politics appears to be hardening into just two, with a winner-take-all attitude and winners determined primarily by turnout rather than appeals to the middle. Congress has become largely reactive and dysfunctional, with the national policy focus shifting to an overly powerful executive branch. This effectively replaces the constitutional system of checks and balances with what amounts to a plebiscitary democracy. Moreover, the rapidity and national scope of twenty-first-century communication, especially with the advent of social media, makes it easier than ever before for people to "kindle the flames of faction" (to use Madison's dramatic words) into a "general conflagration." The engines of this conflagration may be the populist right, the progressive left, or something else entirely.

The Madisonian system relied on the idea that public-spirited leaders representing a multiplicity of factions would have sufficient time and independence to deliberate in good faith with representatives of contrary interests and views and act on the basis of the long-term interests of the nation as a whole. The results of this deliberation, he thought, would be more consonant with protecting "both the common good and the rights of other citizens" (*Federalist* 10). Leaders would vote for policies they think wise and would face the voters several years later on the basis of how well those policies work. Today, by contrast, political and opinion leaders are often subservient to the hair-trigger reactions of Twitter-mobilized factions, which have no patience for compromise, little interest in long-term consequences, and a seeming delight in making life miserable for their opponents. Politics in the age of social media is less a search for broad-based solutions than a zero-sum struggle for dominance, with deliberation and compromise signaling weakness.

The greatest challenge of our day is not the receptivity of young people to the siren song of socialism, however troubling that may be. It is the susceptibility of our political culture to demagoguery and division on a scale unprecedented in

recent American history. We are fortunate that America's constitutional institutions are as strong and resilient as they are. The stresses on the system from irresponsible leaders egged on by "the demon of faction" (as Hamilton called it) have been formidable. It would be tempting to hope that electing a better class of leaders would get us out of this predicament. But that is a futile hope, for as Madison warned, "enlightened statesmen will not always be at the helm." The excesses on one side only serve to fuel new excesses among its opponents. Real solutions will require a revitalization of stabilizing institutions such as responsible political parties, a credible press, civic education, a larger role for legislative deliberation, and an administrative state governed by the rule of law. Perhaps when the current interlocking crises subside, the American people will be more willing to turn again in that direction. If they do, they will find in the Constitution what Madison called "a republic remedy for the diseases most incident to republican government" (*Federalist* 10).

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[1] Locke acknowledged this logical inconsistency in a backhanded way: he offered justification for a narrow class of servitude for persons captured for fighting an unjust war—conditions obviously inapplicable to the oppressed people held in bondage on American plantations.

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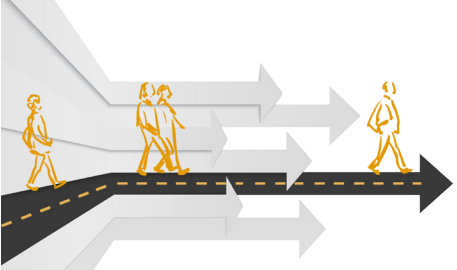

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